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IN THE

Supreme Court of the United States

October Term, 1965

No. 773

THEMISTOCLES BOUAS,

Respondent,

—against—

SOCIEDAD MARITIMA SAN NICHOLAS, S.A., and P. D. MARCHESSINI & CO., INC.,

Petitioners.

THEMISTOCLES BOUAS,

Respondent,

—against—

PANAGHI D. MARCHESSINI, DEMETRI P. MARCHESSINI and ALEXANDER P. MARCHESSINI,

Petitioners.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

Petitioners seek review of an order of the United States Court of Appeals, Second Circuit (A-1),* dismissing for lack of jurisdiction petitioners' appeal from two orders of the United States District Court, Southern District of New York (A-2–A-5).

This is an action by a merchant seaman to recover damages for severe personal injuries suffered by him aboard

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* All references are to Petitioners' Appendix.

the S S EURYVIADIS, among which injuries were fractures of the right ankle (lateral malleolus) and the right heel bone (Os calcis) with gross displacement and involving joint surfaces, fracture of the right wrist involving the lower end of the radius, as well as fractures of two ribs of the left lower chest.

The first District Court order, dated April 23, 1965, denied petitioners' motion for summary judgment and in the alternative for leave to amend petitioners' answers so as to allege affirmative defenses of accord and satisfaction and *res judicata* (A-4). This motion was predicated upon allegedly "newly discovered evidence" (A-3, A-6), which was admittedly in existence, and known by petitioners, for nearly four years (A-3). Same consisted of an alleged settlement made with the injured seaman in Greece and claimed by petitioners to be *res judicata* in the instant action (A-3). There was no judgment or proof of one made by Greek authorities and none is contained in the Record hereon.

This purported settlement was in the sum of $635.40 for all respondent's injuries and the District Court found that the alleged settlement was "ridiculously low" in amount (A-3); that respondent was not represented by counsel in Greece when the "settlement" was made (A-3); that the Greek Court involved in the settlement was not advised of the action *sub judice* which was then already pending in the District Court (A-6).

The District Court further found "There is little, if any, doubt that plaintiff was unaware of what he was doing. Accordingly, the so-called Greek settlement was not an accord and satisfaction . . .; nor is the Court bound by it as *res judicata*" (A-3).

The second order involved hereon was dated July 7, 1965, and denied petitioners' motion for reargument and for certification for interlocutory appeal of the prior order of the District Court [28 U.S.C. 1292 (b)] (A-5). The District Court denied the motion for reargument as well as the request for leave to appeal, (A-7) pointing up the respondents' laches in withholding the facts relative to the purported defense for approximately four years (A-3, A-4, A-6) while, during the same period engaging respondent in a "history of pre-trial litigation out of all proportion to the nature of the claim, and which appears, at least in part, to have been designed to delay and burden the plaintiff" (A-2).

Despite the fact that the certification for interlocutory appeal pursuant to 28 U.S.C. 1292 (b) had been denied, petitioners nevertheless on August 5, 1965 filed a Notice of Appeal to the Court of Appeals from the Orders of April 23, 1965 and July 7, 1965. Same was dismissed on motion of respondent (A-1) and it is this order for which certiorari is now sought by petitioners. It should be noted that petitioners' motion to reargue the original order was belatedly filed (A-5) and that their notice of appeal therefrom was also untimely.

Reasons for Denying the Writ

1. Petitioners' appeal to the Court of Appeals from the order of April 23, 1965 was not timely.

2. The order of the Court of Appeals, Second Circuit, dismissing the petitioners' appeal for lack of jurisdiction was clearly correct since the District Court orders lacked the finality requisite to appellate review required by 28

U.S.C. 1291. Insofar as the District Court order of April 23, 1961 denied the motion for summary judgment, it is not a final order entirely disposing of the District Court action and is therefore not immediately appealable. *Valdosta Livestock Company* v. *Williams,* 316 F. 2d 188 (4th Cir., 1963); *Burleson* v. *Canada,* 285 F. 2d 264, 265 (4th Cir., 1961). *Waller* v. *Professional Insurance Corp.,* 316 F. 2d 729 (C.A. 5th, 1963); *Atlantic Co.* v. *Citizens Ice and Cold Storage Co.,* 178 F. 2d 453 (C.A. 5th, 1949); 28 U.S.C. §1291.

Further, that part of the said District Court order denying petitioners' application for leave to amend is also not a final order appealable as a matter of right. *Hancock Oil Co.* v. *Universal Oil Products Co.,* 120 F. 2d 959 (C.C.A. Cal. 1941), cert. denied 314 U.S. 666, 62 S. Ct. 127, 86 L. Ed. 533; *National Machinery Company* v. *Waterbury Farrel Foundry and Machine Co.,* 290 F. 2d 527, 528 (2nd Cir., 1961); *Balboa Shipping Co.* v. *Standard Fruit & Steamship Co.,* 181 F. 2d 109, 110 (2nd Cir., 1950); 28 U.S.C. § 1291.

Additionally, the District Court order of July 7, denying reargument is likewise interlocutory and not appealable. *Spampinato* v. *M. Berger & Co., Inc. et al.,* 270 F. 2d 46, 48 (2nd Cir., 1961), cert. den. 361 U.S. 944, 80 S. Ct. 409, rehearing den. 361 U.S. 97; 80 S. Ct. 597; *Kleins Outlet Inc., et al.* v. *Lifton,* 181 F. 2d 713, 714 (2nd Cir., 1950), cert. den. 340 U.S. 833, 71 S. Ct. 59.

3. There is no conflict between the circuits.

Petitioners claim a conflict exists in that in a "similar" case, *Gillespie Admx.* v. *U.S. Steel Corporation,* 321 F. 2d 518, the Court of Appeals, Sixth Circuit, allegedly held

the appeal was "in effect from a final order" and heard the appeal whereas in the case *sub judice,* the Court of Appeals for the Second Circuit held the order appealed from was "non final" and dismissed the appeal.

There is no indication by petitioners as to how the cases are "similar". In fact, they are entirely dissimilar.

In the *Gillespie* case, Mary Gillespie, administratrix of the estate of her son, a seaman, brought an action to recover damages for his wrongful death. The administratrix's complaint alleged claims under the Jones Act for her benefit and for the benefit of the decedent's brother and sisters, alleged beneficiaries of decedent. The administratrix also claimed damages under the General Maritime Law and the Ohio Wrongful Death Statute. The District Court dismissed the latter two claims, and also dismissed the claims of the alleged "beneficiaries" under the Jones Act. The administratrix appealed, claiming that the order of dismissal was final, and thus appealable.

The petitioners' case does not involve a wrongful death action nor a dismissal of any of petitioners' claims at the threshold of suit. All that was involved in the District Court was the denials of motions made by petitioners long after the pleadings were closed and the cases placed on the trial calendar. Nor did the District Court orders leave petitioners out of court, as were the "beneficiaries" in the *Gillespie* case, when the District Court dismissed their claims.

Nor is there any conflict in the decisions of the circuits as petitioners claim, since the Court of Appeals in *Gillespie* expressly did not decide whether or not the determination

of the District Court was final, but in fact determined the matter in response to the administratrix's and the beneficiaries' application for extraordinary relief (321 F. 2d at pages 520 and 522).

Ultimately, this court held the *Gillespie* order to be "final", citing important reasons therefor. *Gillespie, Admx. v. U.S. Steel Corporation,* 379 U.S. 148, 13 L. Ed. 2d 199. The Court stated that the District Court order raised questions which were "fundamental to the further conduct of the case" and that a "delay of perhaps a number of years" in determining the rights of the "beneficiaries" might work a great injustice to them and that these considerations outweighed the inconvenience of piecemeal review (379 U.S. 153, 154, 13 L. Ed. 2d at pages 203, 204). As the court's opinion shows, the questions which were fundamental, involved the interpretation of an important Federal law.

As a matter of law, the instant and the *Gillespie* cases are in no ways comparable. *Gillespie* determined an important matter of Federal law. In the instant case, no matter of Federal law not already decided is before the Court. It has long been decided that orders permitting or denying the amendment of a pleading, are not final (see above cases cited), whereas in *Gillespie* it was determined that the order entirely dismissing the claims was final.

With respect to the claim of hardship alleged by petitioners herein at page 6 of their petition, the reasons cited by petitioners are no different than those present upon the resolution of any interlocutory order. Some inconvenience will follow so long as the Federal Courts are committed to a policy against piecemeal appeals.

CONCLUSION

There has been no showing made by petitioners of any error whatever herein nor any basis for an alleged review of the order of the Court of Appeals or of the orders of the District Court. It is respectfully prayed that the petition for a writ of certiorari be denied in all respects.

Respectfully submitted,

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